Office Supreme Court, U.S.
FILED
AUG 22 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 364

JAMES R. HOFFA and ROBERT E. McCARTHY, JR.,
Petitioners,

v.

HONORABLE JOSEPH P. LIER, United States District Judge for the Southern District of Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,

CHARLES E. DAVIS,
FISHBACK, WHITAKER, DAVIS,
DOMINICK AND TROUTMAN,
170 E. Washington Street,
Orlando, Florida,

Attorneys for Petitioner James R. Hoffa,

O. B. CLINE, JR.,
1518 Alfred I. DuPont Bldg.,
Miami 32, Florida,
Attorney for Petitioner Robert E. McCarthy, Jr.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Manipulation of the Racial Balance of Names Placed in the Jury Box	5
Systematic Exclusion of "Blue Collar" Workers and Persons in Similar Economic Status	10
The Orlando Division Is Not Part of the District Most Favorable to an Impartial Trial	12
Reasons for Granting the Writ	15
Conclusion	23
APPENDIX:	
Order of Motion for Leave to File Petition for Writ of Mandamus	1a
Order on Petition for Rehearing on Motion for Leave to File Petition for Writ of Mandamus	1a
Statutes Involved	2a

INDEX OF CITATIONS

CASES:

Ballard v. United States, 329 U.S. 187 (1947)	19
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	19, 20
Cassell v. Texas, 339 U.S. 282 (1950)	15
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	19, 20
Fay v. New York, 332 U.S. 261 (1947)	18

	Page
Hill v. Texas, 316 U.S. 400 (1942)	16
LaBuy v. Howes Leather Co., 352 U.S. 249 (1957)	19
Pierre v. Louisiana, 306 U.S. 354 (1939)	16
Smith v. Texas, 311 U.S. 128 (1940)	16
Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)	18, 19
United States v. Hoffa, 196 F. Supp. 25 (July 1961)	6
CONSTITUTION OF THE UNITED STATES, Fifth Amendment	3, 16
FEDERAL RULE OF CRIMINAL PROCEDURE 21(a)	14
STATUTES:	
28 U.S.C. 1254(1)	2
1341	4
1343	4
1651	3, 2a
1861	3, 17, 2a
1863(c)	3, 2a
1865(a)	3, 15, 21, 22, 2a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

JAMES R. HOFFA and ROBERT E. McCARTHY, JR.,
Petitioners,

v.

HONORABLE JOSEPH P. LIEB, United States District Judge for the Southern District of Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 27, 1962.

OPINIONS BELOW

The order of the Court of Appeals is printed at page 1a of the Appendix, *infra*. The relevant decision of the District Court is found in an opinion not yet reported, printed in the Transcript of Record, hereinafter referred to as the Record, at pp. 2-26.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1962. (App., p. 1a, *infra*). A timely petition for rehearing was denied on July 24, 1962. (App., p. 1a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether Federal jury officials may consciously and deliberately manipulate the racial balance of names placed in a Federal jury box.

II. Whether the systematic exclusion from a Federal grand jury of wage earners, laborers, and working men of the lower economic strata who are likely to be members of labor unions is permissible.

III. Whether an indictment is void where returned by a Federal grand jury drawn from the part of the judicial district conclusively found not to be the part most favorable to an impartial trial, and where the grand jury was drawn from that part of the district in which the District Court found to exist a local interest greater than that which might be present in another locality with a resulting atmosphere of partiality and bias.

IV. Whether the writ of mandamus is a proper remedy to guarantee the selection of a Federal grand

jury without discrimination on the basis of race, color, or occupation, and in accordance with the governing statutory provisions designed to insure a fair and impartial grand jury.

STATUTES INVOLVED

Pertinent statutes involved are Sections 1861, 1863(c), 1865(a), and 1651 of the Judicial Code, Title 28 U.S.C., and these are printed at the end of the appendix to this Petition for Writ of Certiorari.

STATEMENT

Petitioners sought a writ of mandamus in the Court of Appeals for the Fifth Circuit to vindicate their right to a fair and impartial, properly constituted grand jury, as guaranteed by the Fifth Amendment to the Constitution of the United States. The petition for the writ stated three separate flaws in the makeup of the grand jury that had returned an indictment against them; conscious and deliberate manipulation of race in the selection of the grand jury, economic discrimination systematically excluding persons in the working men or laboring classes, and judicially found prejudice in the division of the District from which the grand jury had been drawn. The Court of Appeals, without hearing argument and without writing an opinion, summarily denied petitioners' motion for leave to file their petition for a writ of mandamus.

The indictment in question was returned by a Federal grand jury in Orlando, Florida, on October 11, 1961. Orlando is the seat of the Orlando Division of the United States District Court for the Southern District of Florida. The Orlando Division comprises four counties in the State of Florida: Orange, Brevard, Seminole and Osceola.

The indictment charges the defendants in fifteen substantive counts and one conspiracy count with violations of 18 U.S.C. §§ 1341 and 1343. The indictment alleges use of interstate facilities in furtherance of a scheme to defraud in connection with the Sun valley retirement community development.

Following arraignment, petitioners moved in the District Court to have the indictment dismissed on the grounds, *inter alia*, that the Federal jury officials had employed racial quotas in filling the jury box, that systematic economic discrimination by these officials led to the inevitable empanelling of "blue ribbon" grand and petit juries, and that the Orlando Division was not the part of the Southern District of Florida most favorable to an impartial trial.

The District Court held a hearing to consider this motion, together with other matters, on March 12, 13 and 14, 1962. Evidence was received, as summarized below.* On May 23, 1962, the District Court denied petitioners' motion in a Memorandum Opinion, printed in the Record at pp. 2-26.

Thereupon, petitioners sought leave to file, in the Court of Appeals for the Fifth Circuit, a petition for writ of mandamus. Record, pp. 27-42. The petition was accompanied by a supporting Memorandum of Law. Record, pp. 42-58. The prosecutor, a Special Assistant to the Attorney General, filed a Memorandum in Opposition to Motion for Leave to File Petition for Writ of Mandamus. Record, pp. 59-61. The prosecutor did not assert that he acted on behalf of the respondent, the District Judge.

---

* The transcript of this hearing has not been filed with the Court as a part of the record in this case. It is referred to herein by the designation "Tr."

The Court of Appeals denied the motion for leave to file the petition for writ of mandamus in a brief order. Record, p. 61.

Petitioners filed a timely petition for rehearing. Record, pp. 62-65. The Government filed a Memorandum in Opposition. Record, pp. 66-68. The petition was denied by the Court of Appeals on July 24, 1962. Record, p. 68.

Manipulation of the Racial Balance of Names Placed in the Jury Box

The petition for writ of mandamus alleges that the grand jury that found the indictment against these petitioners was drawn from a jury box filled contrary to the requirements of law in that there was systematic and deliberate use of the factor of race by the Federal jury officials.

In support of this contention, the petition recounts in great detail the actions of the Jury Commissioner and the Deputy Clerk of the District Court in filling the jury box for the Orlando Division on September 15, 1961. The facts alleged were drawn almost entirely from the testimony of these two court officers in the hearing held by the District Court on the motion to dismiss the indictment. Inasmuch as the petition for writ of mandamus is reproduced in the Record herewith, it is not necessary to repeat the myriad of details to support petitioners' contention. (The allegations with respect to the conscious attempt to regulate the racial balance in the jury box are found in the Record at pp. 29-34.) Fairly summarized, the testimony of the Jury Commissioner and the Deputy Clerk reveals the following:

On September 15, 1961, they placed 928 or 929 names into the jury box of the Orlando Division of the United States District Court for the Southern District of Florida. As of that date, the jury box was completely empty. All names left from previous fillings had been removed as a result of a ruling by the District Court that the previous method of selecting names had been unlawful. *United States* v. *Hoffa,* 196 F. Supp. 25 (July 1961).

The most important testimony was elicited from the Jury Commissioner, Mr. Joel P. Phillips, Jr. A successful business man and respected citizen, Mr. Phillips tried to be completely honest and candid in his testimony. He admitted under oath that he and the Deputy Clerk had consciously set out to maintain a racial balance among the names they placed into the jury box in accordance with the population statistics for the area. He added that "we achieved that pretty closely." (Tr. 276).

Mr. Phillips made it clear that the jury officials had a predetermined quota of non-whites in describing the manner in which names were selected. First, they asked some 63 people to submit lists of names. The responses to these requests, discussed below, did not provide them with a sufficient number of names. Nor did it supply what they believed was the right number of names of Negroes. As Mr. Phillips put it: "I would say that we had a problem of obtaining a sufficient number of colored people on this list . . ." (Tr. 274). Nothing could more clearly demonstrate that the Jury Commissioner had a pre-conceived quota of Negroes, a number that he did not want to be substantially below. Presumably, it was also a number that he would not have wanted to exceed.

A simple and direct remedy was employed by the jury officials to cure the lack of a "sufficient number of colored people" in the names supplied by the suggestors. They consciously and deliberately placed the names of Negroes in the jury box, *solely because they were the names of Negroes.* As Mr. Phillips described the remedy, they used the obvious pattern of residential segregation to find the names of Negroes.

The sources to which the jury officials turned were the City Directory of Orlando and the telephone books covering the four counties comprising the Orlando Division. Each of these books provides street addresses; indeed, the city directory is organized on the basis of address. The jury officials admittedly took names from these source books from areas known to be populated by Negroes solely in order to bring the number of Negroes up to their pre-established quota.

Again, the testimony of Mr. Phillips sums up the matter completely. He was asked whether, in using the directories, any attention had been paid to particular residential areas. The question put to him did not in terms, or in context, refer to the matter of race or color. Before answering, Mr. Phillips went out of his way to note that he was giving an honest reply. Then he said: "I would say that we had a problem of obtaining a sufficient number of colored people on this list and *there were times when a street* [*address*] *may have played a part in an effort to get a sufficient number of colored people.*" (Tr. 274) (Emphasis added).

The conscious manipulation of the racial balance of the names in the jury box was not limited to the actions of the jury officials in selecting names from street and telephone directories. It also operated in their choice

of "suggestors" where racial factors were intentionally applied. Of the 63 persons from whom names were sought, 47 were white and 16 were Negro. The Jury Commissioner admitted that this ratio was set in an effort to control the balance of races in the names submitted. He added his view that they ultimately "achieved [their goal] pretty closely." (Tr. 276).

By establishing a ratio of white to Negro "suggestors" in the hope thereby to control the racial proportions of the names that went into the jury box, the jury officials must have anticipated that the "suggestors" would practice almost complete racial discrimination in compiling their lists. Such, according to the testimony, is precisely what happened. There were 34 lists returned. Of these 27 were from white "suggestors". On these 27 lists, the jury officials testified, there were but four or five names of Negroes, less than one per cent of the names on these lists. Likewise, on the 7 lists received from Negro "suggestors", according to the jury officials, there were very few names of white persons.

Two very significant conclusions appear from this evidence. First, the jury officials were consciously aware of the number of names of Negroes and white persons on the lists received from the "suggestors". Race was clearly an element consciously in the forefront of their effort to fill the jury box. Otherwise, the number of whites and Negroes on the lists would not have appeared relevant to them. Reinforcing this is the second, and more important point. Having received these lists and taken the trouble to learn the racial proportions, they concluded that they did not have a sufficient number of Negroes names. They had not met the quota they had set for themselves. Ac-

cordingly, as shown earlier, they methodically proceeded to pick out of directories the names of Negroes solely because they were Negroes.

In short, the whole process of filling the jury box in this case was shot through with conscious and deliberate manipulation of the element of race. From the fixing of the ratio of white to Negro "suggestors" to the evaluation of the lists furnished by them to the supplementation of those lists from directories, race was a prominent and controlling factor in the action of the jury officials.

Not surprisingly, the system of race quotas thus applied led to a gross underrepresentation of non-whites in the jury box. By March 1962, the time of the hearing in the District Court, 300 names had already been drawn out of the jury box for six jury panels, including the grand jury that returned the indictment against petitioners. These 300 names constitute almost one-third of the names that were placed into the jury box on September 15, 1961. Being a large sample drawn at random from the box, it obviously reflects with great accuracy the racial balance of names that went into the jury box in September 1961.

Of the 300 names that have been drawn, only 15 have been non-whites. In percentage terms, therefore, only 5 percent of the names in the jury box are names of Negroes. By contrast, the Eighteenth Census of the United States, as of April 1, 1960, showed that 13.6 percent of the total population over 21 years of age in the Orlando Division is non-white. The great vice of allowing race to be a conscious and controlled factor in the selection of names for jury service is obvious. Undoubtedly, the result of great underrepresentation found here is attributable to the quota system applied by the jury officials.

But, it is important to emphasize, the primary evil in the practice disclosed is not the imbalance that has occurred in the final result. The Federal courts cannot tolerate a procedure that permits deliberate manipulation of race in jury selection. It is unreasonable to use a Negro as a "suggestor" just because he is a Negro. It is inexcusable to put the name of a person into the jury box simply because he is a Negro. It is patently illegal to apply racial quotas, regardless of what the ratio may be. The factor of race should be as irrelevant to picking a jury as is the factor of religion. The evils are magnified and aggravated when, as here, the effect of the manipulation is gross discrimination against a minority class of our society.

Systematic Exclusion of "Blue Collar" Workers and Persons in Similar Economic Status

The petition for a writ of mandamus alleges that the grand jury that found the indictment against these petitioners was drawn from a jury box filled contrary to the requirements of law in that there was systematic exclusion of persons in the lower economic or laboring class, exclusion therefore of persons likely to be members of a labor union.

As is the matter of race, the petition recounts in considerable detail the facts to support the contention that economic discrimination was operative in the system applied by the jury officials when they compiled the list of names they placed in the Federal jury box. (The relevant portions of the petition are printed in the Record at pp. 34-38.)

Again, the evidence relied upon to support petitioners' contention comes from the court officials themselves. It is not partisan testimony. It is a carefully prepared study made by the Deputy Clerk, Mrs. Mildred Durrance, of the occupations of all the persons

whose names were placed in the jury box. The study was introduced in the District Court as Defendants' Exhibit D, and appears at the end of the transcript of the proceedings in the District Court. (Tr. A-20 to A-22).

Analysis of the Deputy Clerk's study reveals that nearly three quarters of the names placed in the jury box were names of professional or semi-professional persons, business proprietors, managers, executives, and the like. The astonishing total of 74 percent of the 928 persons were from the "cream" of the economic community in the Orlando Division.

For illustration, there are thirteen categories on Mrs. Durrance's list with twenty or more names in them. The "blue ribbon" quality of the persons considered is obvious from the composition of these groups:

Merchant	66
Accountant	34
Manager	55
Clerk, steno, secy	44
Clerk Salesman	75
Farmer	22
Insurance	32
Real Estate	27
Housewife	64*
Citrus grower	31
Govt. Employee	28
Engineer and tech	45
Teacher	39
Total	562

* While housewives are manifestly not in an economic class likely to belong to a labor union, perhaps a few are from homes of this class. In view of the very low percentage of men in the lower economic class, it is reasonable to infer that there is no greater percentage of their wives among the women in this group. In such a case, their inclusion here does not have a substantial effect on the issue.

Note that not one of these, the largest group on Mrs. Durrance's list, is a laboring or working class group. These are representatives of the higher echelons of economic life, not "blue collar" or union men.

In addition to these major groups, the study made by the Deputy Clerk reveals an interesting collection of high income occupations, enterpreneurs, professional and semi-professional persons, managerial and executive personnel. The petition for writ of mandamus sets out 125 such persons on Mrs. Durrance's list over and above the 562 in the larger categories. See Record at pp. 35-36. There are, for example, bankers, jewelers, and druggists, advertising, newspaper and public relations men, builders, hotel and motel owners and operators, credit managers, inspectors and administrators. There is one foreign liaison officer and even a motion picture director. These are typical of the list, which is replete with such occupations.

The result, quite manifestly, is a "blue ribbon" collection of people. The Federal jury box in the Orlando Division is heavily "stacked" with the wealthy and the well-to-do. With at least three quarters of the names in the jury box from this top slice of the economic community, it is certain that the strong majority of every jury panel will reflect the values, the preconceptions, and the attitudes of this one segment of society, rather than the community as a whole.

The Orlando Division Is Not the Part of the District Most Favorable to an Impartial Trial

The petition for writ of mandamus alleges that the grand jurors who returned the indictment in this case were not selected from that part of the Southern District of Florida as to be most favorable to an impartial trial.

In support of this contention, the petition relies upon the uncontroverted finding of the District Court that there exists in the Orlando Division extraordinary prejudice against petitioners, not likely to be found elsewhere in the District.

The District Court found that there is presently pending in Orlando, a civil action related to the criminal charges in the pending indictment. The civil suit involves the First National Bank of Orlando and its principal officers. That suit concerns to a very material degree the transactions that are set forth in the indictment. The officers of the bank involved are very prominent citizens of Orlando. All of these facts were expressly found by the District Court and have not been challenged or controverted to any degree by the Government.

In the language of the Memorandum Opinion, Judge Lieb found from the evidence:—

> ". . . that there is presently pending in Orlando a civil action between Local 299 of the Teamsters and the First National Bank of Orlando; that the transactions described in this indictment involve said bank to a very material degree; and that certain officers of said bank, who very actively participated in the financial transactions involved in this indictment, are very prominent citizens of said city." (Record at p. 24).

Judge Lieb concluded from these facts that there exists in the Orlando Division prejudice against the defendants so great that they cannot obtain a fair and impartial trial there. The District Court expressly found that *"these facts create a local interest in this matter which is greater than that which might be present in another locality."* (*Ibid.*) (Emphasis added). The

lower court added that the facts ". . . tend to create an atmosphere which might present some difficulty in selecting an impartial and unbiased petit jury." (*Ibid.*)

The District Court's action, on the basis of the foregoing factual determinations, was to order the case transferred for trial to the Tampa Division of the Southern District of Florida. The order rests upon Federal Rule of Criminal Procedure 21(a), authorizing such an order only when there exists "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" in the district or division in which the action is pending. Judge Lieb has found from the evidence that prejudice of this magnitude does exist in the Orlando Division.

All of the factual elements of the great prejudice found to exist by Judge Lieb in March 1962 were present with equal force six months earlier at the time of the selection and deliberation of the grand jury. The civil action was then pending. The bank was and is involved in the action to a very material degree, as were and are the officers, who actively participated in the transactions involved in this indictment. The bank officers were, of course, prominent citizens of Orlando then as well. In short, every ingredient of the prejudice that is now so great as to prevent a fair and impartial trial existed with equal strength at the time of the grand jury proceedings.

It necessarily follows, therefore, that the same prejudice existed when the grand jury was drawn.

The District Court further determined that this prejudice would not prevent a fair trial in the Tampa Division of the Southern District of Florida. Ordering transfer, the lower court took the action "to assure

that the defendants are tried in a locality which is free from prejudice." (*Ibid.*) The District Court thus found that the Tampa Division is a more favorable part of the Southern District of Florida for conducting an impartial trial than is the Orlando Division.

A fortiori, the Orlando Division is not the part of the Southern District of Florida most favorable to an impartial trial. The Judicial Code, 28 U.S.C. § 1865(a), directs that grand jurors shall be drawn from such parts of the district as to be most favorable to an impartial trial. Since the grand jurors in this case were drawn from the Orlando Division, where very great prejudice has been judicially found to exist, the grand jurors patently were not drawn from that part of the district most favorably to an impartial trial. The indictment returned by grand jurors selected in violation of § 1865(a) is clearly void.

REASONS FOR GRANTING THE WRIT

1. But for the ruling of the District Court in this case, we should have considered it beyond argument that Federal grand jurors may not be selected according to the color of their skin or their shirt.

Only recently, Federal courts found it necessary to order the removal of signs, designating "white" and "colored", over the doors of interstate carriers. It is certainly unlawful to require white and colored persons to use separate doors to waiting rooms. It is incomparably worse to have "white" and "colored" doors for the entry of Federal jurors to jury service.

This Court has repeatedly struck down convictions in State courts, as in violation of the United States Constitution, for racial discrimination in the selection of grand juries. *Cassell* v. *Texas*, 339 U.S. 282 (1950);

Hill v. *Texas*, 316 U.S. 400 (1942); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). This case reveals a practice *in a Federal court* that would be constitutionally intolerable even in a State court, *i.e.*, the deliberate and intentional manipulation of the racial balance of a grand jury.

The right to a grand jury in a Federal court is expressly guaranteed by the Fifth Amendment to the Constitution of the United States. So far as counsel for petitioners are aware, there is no case, certainly in modern times, that has disclosed the practice of race quotas for jury selection in a Federal court like that revealed here. This absence of a large number of cases does not indicate that the situation here is novel or unique.

In the first place, the system necessarily affects every grand jury and every petit jury that sits in the Orlando Division of the United States District Court for the Southern District of Florida. As of March 1962, six jury panels had been drawn already from the tainted jury box. Six hundred names remain to be drawn. And there is nothing to indicate that the jury officials, when the box needs refilling, will perform their task any differently than they did in September 1961.

Secondly, the intentional manipulation of race in the filling of a Federal jury box has been and is defended *on its merits* by the Department of Justice. The Government argued successfully in the District Court that it was proper for Federal jury officials to use race consciously if they were doing so to *include* rather than to *exclude* Negroes. The pure sophistry of this argument is apparent on its face. But the greater danger manifested is the affirmative approval of the practice that has been given by the Department of Justice, a depart-

ment that carries great influence through the United States Attorneys in setting the legal standards for correct practice in the Federal courts.

Finally, the system followed by these jury officials now has the judicial imprimatur of the District Court, the respondent in this case. The practice has been subjected to judicial scrutiny and been found totally proper. The Court held that "the clerk and the jury commissioner meticulously followed the requirements of the statute", that they "have been conscious of their duty to provide a jury list which is a representative cross-section of the qualified populace." (Record, p. 16). The District Court has given its unqualified stamp of approval to a practice that must be anathema to the Federal jury system.

The time is ripe to root out this invidious practice before it undermines the constitutional right to a grand and petit jury. Until very recently, Federal courts were restricted by statute to selecting jurors from among those eligible for jury service in the courts of the State in which a Federal court was located. It was simple and permissible for Federal jury officials to utilize the lists compiled by State officials. The Civil Rights Act of 1957 cut that bond. The provision of the Judicial Code that defined the qualifications of a Federal juror by reference to State law, formerly 28 U.S.C. § 1861(4), was repealed. 71 STAT. 634, 638.

Federal jury officials have been placed thereby in a new situation. No longer dependent upon State practices, they are evolving distinctive Federal procedures for jury selection. As this case demonstrates, there is an urgent and immediate need for this Court to provide, as soon as possible, the basic guidelines that will

control the Federal practice—especially on the highly sensitive and critically important handling of the issue of race in the selection of juries.

The same is true with respect to the patent economic discrimination practiced by the jury officials in filling the jury box. This Court held that the "blue ribbon" jury in a State criminal prosecution did not violate the Fourteenth Amendment to the Constitution of the United States. *Fay* v. *New York*, 332 U.S. 261 (1947). But the opinion of the Court made it absolutely clear that such economic discrimination would be intolerable in a Federal court. *Id.* at 287. Moreover, in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), this Court held that the exclusion from jury service of persons who work for a daily wage, the lowest economic class, so distorted the democratic process of jury selection that a jury selected in that manner was illegal.

There can be no dispute over the fact of serious economic distortion in this case. The fact is demonstrated by the study of Mrs. Mildred Durrance, the Deputy Clerk of the District Court. This study conclusively demonstrated that three quarters of the names chosen for the jury box were from the thin "upper crust" of the Orlando Division. In the District Court below, the Government bleated weakly about spurious statistics. The issue here is not one of statistics. It is the most simple arithmetic, requiring nothing more than to add up the data provided by the Deputy Clerk.

What really matters is that again, as in the issue of race manipulation, the practice disclosed has received the unconditional endorsement of the Department of Justice and the affirmative approval of the District Court. A "blue ribbon" jury system in a Federal court has been brought to light and nonetheless upheld.

This Court has spoken with great force on the need to have the Federal jury system comport with the democratic ideal. *Ballard* v. *United States*, 329 U.S. 187 (1947); *Thiel* v. *Southern Pacific Co., supra.* The opinion of the Court in *Ballard* declared that "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." 329 U.S. at 195. So strongly has this Court held to the vital necessity to preserve the integrity and purity of the Federal jury system that it has expressly held defects to be reversible error without any showing of prejudice or harm to the litigants in a specific case. *Ibid.*

The integrity of the Federal jury system is too important, and too much litigation is affected beyond this case, to permit the Court of Appeals refusal of the writ of mandamus to lie. This Court has held that the writ is appropriate to vindicate the right to jury trial in a civil case. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *cf. LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). This Court said, in *Dairy Queen*, that it is "the responsibility of the Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury." The dissenting Justices in the *Beacon Theatres* case flatly held: "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial." 359 U.S. at 511. Precisely such a constitutional and statutory right is presented here. A tainted jury, such as is revealed in this case, is just as bad as, indeed worse than, the denial of a jury in *Beacon Theatres* and *Dairy Queen*.

Plainly this is an appropriate case for the Court to exercise its certiorari jurisdiction. There is no more important question in the administration of law than the integrity of the jury system. This is especially true in a criminal proceeding. The questions presented extend well beyond the immediate criminal prosecution against these petitioners. Innumerable cases are or might be affected. The time is ripe to set the Federal jury system on the proper path for the future.

2. The record compiled in this case is complete and adequate for this Court's consideration of the important questions presented. The Government's entire argument in the Court of Appeals was devoted to the position that petitioners are premature in bringing these vital issues to the appellate level. The Government's Memorandum did not bother to distinguish, even to cite, this Court's decisions in *Dairy Queen, Inc.* v. *Wood, supra*, and *Beacon Theatres, Inc.* v. *Westover, supra*. See Record, pp. 59-61.*

The issues raised by petitioners, seeking the writ of mandamus below and the writ of certiorari here, have been finally adjudicated in the District Court. A complete record has been compiled. The questions will not again arise in this case in the trial court. The trial of the merits of the indictment cannot illuminate or clarify the issues in any way. It may be noted that, since the District Court has ordered the case transferred out of the Orlando Division, even the selection of a petit jury would not present a second opportunity

* The Government's Memorandum in Opposition to Petition for Rehearing did refer to *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), but stated only the obvious: the present case is factually dissimilar from *Dairy Queen*. This does not mean that a similar principle is not involved.

to challenge in the trial court the legitimacy of the Orlando jury box.

Other juries are being drawn from the jury box in Orlando, however. And no one knows how many other Federal jury boxes are similarly tainted. Postponement of the treatment of the important questions raised would not be consistent with the high order of the rights involved. Where defects so palpable are presented, one would ordinarily expect the Department of Justice to join in an effort to have a speedy, authoritative, appellate resolution of the major issues. As has been apparent for some time, however, the Department of Justice does not view this case as a normal prosecution.

If petitioners are correct in contending that the questions presented are substantial and sufficiently important to warrant the attention of this Supreme Court, then it is appropriate for this Court to grant review now. Counsel for both sides have estimated that the trial on the merits of this indictment will be extraordinarily lengthy, probably lasting for several months. The District Court, in response to this fact, has initiated special pretrial proceedings. Nonetheless, an extremely protracted trial is in the offing. Sound administration would not permit the expenditure of valuable judicial resources without first resolving the validity of the grand jury that returned the indictment.

3. The third question presented focuses on the statutory guarantee that, where jurors are drawn from less than the entire judicial district, they shall be selected from that part of the district most favorable to an impartial trial.

The Judicial Code, 28 U.S.C. § 1865(a), provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the

court directs so as to be most favorable to an impartial trial, . . ."

This provision is mandatory and without qualification or exception. The portion applicable to the present case declares that grand jurors shall be drawn from that part of a district as to be most favorable to an impartial trial.

The District Court in the present case found that there existed in the Orlando Division so great prejudice against the defendants that they could not obtain a fair and impartial trial there. The source of that prejudice is spelled out in the court's opinion. The District Judge mistakenly believe the appropriate remedy for this great prejudice was to transfer the trial to a different part of the Southern District of Florida.

While the remedy employed by the trial judge might overcome the discerned prejudice insofar as the petit jury is concerned, it would leave unremedied the effect of the prejudice on the grand jury. The prejudice-causing elements were operative with equal force six months prior to the District Court's hearing. At that earlier time, the grand jury was in session. On the basis of the facts already noticed judicially, there has been a violation of the unconditional mandate of § 1865(a).

The error in these proceedings is so certain that it would be highly imprudent to proceed to trial on the faulty indictment. Under these circumstances, it is meet to suggest to this Court a summary reversal of the decision below and an order making it possible for the District Court to reconsider the appropriate remedy in light of finding of prejudice in the Orlando Division

so great that petitioners cannot obtain a fair and impartial trial there.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,

CHARLES E. DAVIS,
FISHBACK, WHITAKER, DAVIS,
DOMINICK AND TROUTMAN,
170 E. Washington Street,
Orlando, Florida,

Attorneys for Petitioner
James R. Hoffa,

O. B. CLINE, JR.,
1518 Alfred I. DuPont Bldg.,
Miami 32, Florida,
Attorney for Petitioner
Robert E. McCarthy, Jr.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES R. HOFFA, ROBERT E. MCCARTHY, JR.,
Petitioners,

v.

HONORABLE JOSEPH P. LIEB, United States District Judge for the Southern District of Florida, *Respondent.*

Order

On Motion for Leave to File Petition for Writ of Mandamus

Before:

HUTCHESON, RIVES, and WISDOM, Circuit Judges

Upon due consideration of the motion for leave to file petition for writ of mandamus in the above case, it is

ORDERED, that the motion to file petition be, and it is hereby DENIED.

Filed June 27, 1962.

Order

On Petition for Rehearing on Motion for Leave to File Petition for Writ of Mandamus

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.
PER CURIAM:

It is ORDERED that the Petition for rehearing on Motion for Leave to File Petition for Writ of Mandamus in the above entitled and numbered cause be, and it is hereby DENIED.

Filed July 24, 1962

STATUTES INVOLVED

28 U.S.C.:

§ 1651. WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

• • •

(June 25, 1958, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102).

§ 1861. QUALIFICATIONS OF FEDERAL JURORS

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service. (As amended Sept. 9, 1957, Pub. L. 85-315, Part V, § 152, 71 Stat. 638).

§ 1863. EXCLUSION OR EXCUSE FROM SERVICE

• • •

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color. (June 25, 1948, c. 646, 62 Stat. 952).

§ 1865. Apportionment Within District; Additional Jury Commissioners.

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

• • •

(June 25, 1948, c. 646, 62 Stat. 952).

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	5

CITATIONS

Cases:

American Airlines v. *Forman*, 204 F. 2d 230 — 4

Atlantic Fishermen's Union v. *United States*, 197 F. 2d 519 — 3

Bank of Columbia v. *Sweeny*, 1 Pet. 567 — 3

Beacon Theatres v. *Westover*, 359 U.S. 500 — 4

Chereton v. *United States*, 256 F. 2d 576 — 3

Conway v. *United States*, 142 F. 2d 202 — 3

Dairy Queen v. *Wood*, 369 U.S. 469 — 4

Fujimoto v. *United States District Court*, 199 F. 2d 27 — 4

Kyle v. *United States*, 211 F. 2d 912 — 3

Parr v. *United States*, 351 U.S. 513 — 3, 4

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21 — 4

United States v. *Foster*, 278 F. 2d 567, certiorari denied, 364 U.S. 834 — 3

United States v. *Golden*, 239 F. 2d 877 — 3

United States v. *Tiplitz*, 202 F. 2d 60 — 3

Statute:

28 U.S.C. 1291 — 3

658875—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 364

JAMES R. HOFFA AND ROBERT E. MCCARTHY, JR.,
PETITIONERS

v.

HONORABLE JOSEPH P. LIEB, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a; R. 76) is not reported.

JURISDICTION

The judgment of the court of appeals denying leave to file a petition for writ of mandamus was entered on June 27, 1962 (Pet. App. 1a.; R. 76). A petition for rehearing was denied on July 24, 1962 (Pet. App. 1a.; R. 84). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioners were properly denied leave to file a petition for a writ of mandamus to compel the district court to vacate an order refusing to dismiss the indictment and setting a trial date.

STATEMENT

Petitioners were indicted in the Southern District of Florida, on October 11, 1961, on sixteen counts charging fraud by mail and wire, and conspiracy to use the mails to defraud. On November 30, 1961, both petitioners moved to dismiss the indictment on numerous grounds, including claims that the grand jury had been improperly selected and constituted, and that prejudicial publicity deprived them of a fair and impartial grand jury.

After a full hearing, commencing March 12, 1962,[1] at which testimony was taken, the district court entered an order on May 23, 1962, denying petitioners' motions to dismiss the indictment and setting the case for trial on September 10, 1962. Petitioners then filed in the Court of Appeals for the Fifth Circuit a motion for leave to file a petition for a writ of mandamus to compel the district court to dismiss the indictment and vacate the setting of the trial. This was denied on June 27, 1962.

---

[1] An appeal from orders of the district court quashing certain subpoenas issued by petitioners in connection with this hearing was dismissed by the Court of Appeals for the Fifth Circuit on June 1, 1962. A petition for a writ of certiorari to review that judgment is presently pending (No. 314, this Term).

ARGUMENT

1. In seeking a writ of mandamus directing the court to dismiss the indictment and vacate the setting of the trial, petitioners were attempting to do indirectly what they could not do directly, *i.e.*, appeal at this stage of the proceedings from the interlocutory order of the district court denying their motions to dismiss the indictment. An order denying a motion to dismiss an indictment is not a final judgment within the meaning of 28 U.S.C. 1291,[2] and is therefore not appealable. See *Chereton* v. *United States*, 256 F. 2d 576 (C.A. 6); *United States* v. *Golden*, 239 F. 2d 877, 878 (C.A. 2); *Kyle* v. *United States*, 211 F. 2d 912, 914 (C.A. 9); *United States* v. *Foster*, 278 F. 2d 567, 569 (C.A. 2), certiorari denied, 364 U.S. 834; *Atlantic Fishermen's Union* v. *United States*, 197 F. 2d 519, 520 (C.A. 1); *Conway* v. *United States*, 142 F. 2d 202, 203 (C.A. 9); *United States* v. *Tiplitz*, 202 F. 2d 60 (C.A. 3); *Parr* v. *United States*, 351 U.S. 513, 518.

This Court, as far back as 1828, refused to permit circumvention, by way of mandamus, of the rule that only final orders may be appealed. Chief Justice Marshall, in *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569, denied a motion for a writ of mandamus directed to the circuit court for the District of Columbia, saying:

> If this motion could now prevail, it would be a plain evasion of the provision of the act of

[2] 28 U.S.C. 1291 provides in pertinent part, "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

> congress, that *final* judgments only should be brought before this court for re-examination. * * * The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times, before there would be a final judgment. * * *

This case is governed by *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30, where a writ of mandamus directing the district court to reinstate pleas in abatement attacking the authority of the grand jury to return an indictment was held to have been improperly issued. This Court noted:

> Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. * * *

See also *Parr* v. *United States*, 351 U.S. 513, 520–521; *Fujimoto* v. *United States District Court*, 199 F. 2d 27 (C.A. 9); *American Airlines* v. *Forman*, 204 F. 2d 230, 232 (C.A. 3).

This is not a situation where the district court was taking a wrong view of its authority as in *Dairy Queen* v. *Wood*, 369 U.S. 469, and *Beacon Theatres* v. *Westover*, 359 U.S. 500, relied upon by petitioner. In the case at bar as in *Roche* (319 U.S. at 32)—

> * * * the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. * * *

The district court's opinion (R. 44–71) recites findings of fact and conclusions of law which reflect a judicial determination of the motions to dismiss the indictment, a matter within its jurisdiction to determine. All that petitioners are claiming is that the district court reached the wrong conclusion. That is a matter to be determined on appeal if there is a final conviction.[3]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
MARIE L. MCCANN,
Attorneys.

SEPTEMBER 1962.

---

[3] Since it is clear that the petitioners' motion for leave to file a petition for a writ of mandamus was properly denied by the court of appeals for the reasons stated above in the text, we do not state the facts or argue the merits of petitioners' allegations concerning the selection of the grand jury which indicted them. However, we in no way assent to the allegations contained in the petition for certiorari.

U.S. GOVERNMENT PRINTING OFFICE: 1962